any order made by it, and as such no previous sanction of the Official Assignee is necessary in the present case.

On the question of whether a bankrupt can employ a solicitor without permission, Mr. Das is also relying on the same provisions as stated earlier on in this judgment. In particular, he relies on section 61(c) of the Bankruptcy Act which provides:

"The Official Assignee, subject to any general or special orders of the court, may employ, with the permission in writing of the Attorney-General, a solicitor to take any proceedings or do any business."

My attention is also drawn to section 152 of the English Bankruptcy Act 1914 which is designed to ensure that solicitors are not totally deprived of the right of audience before the Bankruptcy Court. This section reads as follows:

"Nothing in this Act shall take away or affect any right of audience that any person may have had at the commencement of this Act."

It is said that decided cases in England have attempted to restrict the scope of section 152, such as *Exparte Reynolds*[2] and *Re Elderton Exparte Russel.*[3] It is argued that there is no corresponding section 152 in our Bankruptcy Act and therefore the right of audience reserved for English solicitors is not available in this country. According to Mr. Das, the position here is entirely governed by section 17(5) and section 61(c) of the Bankruptcy Act, and according to his interpretation, in all cases only the Official Assignee can employ a solicitor on behalf of an undischarged bankrupt upon authorisation for the same from the Attorney-General. In my view, there is nothing in our Bankruptcy Act to suggest that, under no circumstances, a bankrupt can on his own employ a solicitor. This is particularly true where, as in the present case, a solicitor is employed in a matter where the cause of action does not vest in the Official Assignee. Even the provision of section 61(c) appears to prohibit only the Official Assignee from employing a solicitor without the written permission of the Attorney-General. As regards the other section, *i.e.* section 17(5), which is relied upon by Mr. Das, it is in the following terms:

"The Official Assignee shall take part in the examination of the debtor, and for the purpose thereof may, if specially authorized by the Attorney-General, employ an advocate and solicitor but no advocate and solicitor shall be allowed to take part in the examination on behalf of the debtor."

From the above provision, it can be inferred that as far as the employment of an advocate and solicitor is concerned only the power of the Official Assignee is restricted but not that of the bankrupt. Further, from the provisions of section 109(1)(m), a bankrupt can in fact enter into a contract provided he discloses the fact of his bankruptcy. If it is the intention of the legislature to curtail the right of a bankrupt to engage an advocate and solicitor in all cases, it would expressly say so in section 17. In the absence of such express prohibition in the Act, I rule that an undischarged bankrupt in this country is entitled to engage an advocate and solicitor to represent him in any action where the provision of section 38(1)(a) does not apply, or where the cause of action does not vest in the Official Assignee.

For the above reasons, I overrule the preliminary objection of the Official Assignee. Accordingly, I order that the bankrupt's application be heard on a date to be fixed by the Senior Assistant Registrar after the period of appeal has lapsed.

Objection overruled.

Solicitors: *V. Manuel & Co.; Ng Ek Teong & Partners.*

VASUDEVAN v. DAMODARAN

[O.C.J. (Syed Agil Barakbah J.) April 27, 1974]
[Alor Star — Civil Suit No. 256 of 1973]

Land Law — Lis pendens — Registration of — Power of High Court — Courts of Judicature Act, 1964 — National Land Code — R.S.C., 1957, O.50 r.1 and O.72 r.2.

Practice and Procedure — Lis pendens — Registration of against property — R.S.C. 1957, O.50 r.1 and O.72 r.2.

This was an application that the order for the registration of a *lis pendens* in respect of certain property be set aside. The application for registration of a *lis pendens* was made subsequent to an order of court setting aside a caveat filed by the respondent-plaintiff reported in *Damodaran* v. *Vasudeva* [1974] 1 M.L.J. 128.

Although the procedure for registration of a *lis pendens* is not embodied in any written law, in view of Order 72 rule 2 of the Rules of the Supreme Court, there is no necessity for any such written law so long as the High Court has the jurisdiction and power to order such registration.

The National Land Code does not either expressly or by implication forbid and limit the power of the High Court to make orders for the purpose of the preservation of property by means other than a caveat.

[**Editorial Note:** The same point was considered by the Court of Appeal in Singapore. See *Singapore Pak Hock Pai Athletic Association* v. *Yiu Pek Heng* [1973] 2 M.L.J. 6.]

Cases referred to:-

(1) *K.I. Muhiudeen Rawther* v. *K.E.P. Abdul Kassim & Ors.* [1959] M.L.J. 257 at p. 258.

(2) *Waimiha Saw Milling Co.* v. *Waione Timber Co.* [1923] 42 N.Z.L.R. 1137.

CIVIL SUIT.

The applicant/defendant made an application by Summons-in-Chambers that the order of the registration of a *lis pendens* made by the High Court on December 20, 1973, in favour of the respondent/plaintiff be set aside and that the costs of the application be taxed and paid by the respondent/plaintiff to the applicant/defendant in any event. The property in dispute comprised of certain lands in the Mukim of Sungei Pasir, District of Kuala Muda, Kedah.

Earlier, the application for the registration of a *lis pendens* was made subsequent to the order of the court setting aside the caveat dated October 3, 1973, filed by the respondent/plaintiff as reported in *Damodaran* v. *Vasudeva*, [1974] 1 M.L.J. 128. (Alor Star Originating Motion No. 38 of 1973). The facts of the dispute between the two parties are sufficiently stated therein.

Peter Mooney for the applicant.

T. R. Hepworth for the respondent.

Syed Agil Barakbah J.: The power of the High Court to order registration of a *lis pendens* is provided

for under the First Schedule to section 25 of the Courts of Judicature Act, 1964, at paragraph 6 under the title "Additional Powers of High Court". It says: —

"Power to provide for the interim preservation of property the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver or *the registration of* a caveat or a *lis pendens* or in any other manner whatsoever." (Italics supplied).

Section 25 of the Act reads as follows: —

"25.(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same."

It is clear under the proviso the powers set out in the Schedule can only be exercised according to a written law in existence or the rule of court relating to the same. I agree with Mr. Mooney for the applicant/defendant that the procedure for registration of a *lis pendens* is not embodied in any written law as in the case of registration of a caveat which has provision in the National Land Code. However, the general power of the High Court for the purpose of interim preservation of property is found in the Rules of the Supreme Court under Order 50 rule 1. Further, Order 72 rule 2 states: —

"Where no other provision is made by any written law or these Rules, the present procedure and practice in England or in Malaya remain in force."

I also agree that there was such procedure in Penang under S.S. Civil Procedure Code which has since been repealed. The Rules of the Supreme Court in Singapore also provide a set procedure for the registration of *lis pendens*. (See Order XLVII rules 21-23). It was urged that there must be a written law locally on the matter before the power given by the Courts of Judicature Act can be exercised. On this issue, I accept the submission of Mr. Hepworth for the respondent/plaintiff that there is no necessity for any such written law in view of Order 72 rule 2 so long as the High Court has jurisdiction and power to order such registration. Paragraph 6 of the First Schedule to section 25 of the Courts of Judicature Act gives the power and section 24 of the Act provides jurisdiction. Further, I cannot accept Mr. Mooney's contention that paragraph 6 of the First Schedule was the result of the draftsman's error. On the contrary, it is enacted for the very purpose of what it expressly says showing a clear intention of Parliament to give the power to the High Court to adjudicate upon the matter. Order 72 rule 2 clarifies the position further by allowing the alternative application of the present procedure and practice in England or in Malaya (under the old law) in the absence of other provision made by any written law or the Rules of the Supreme Court. I hold the view that there is no necessity for the existence of any written law in our country for the purpose and the Land Charges Act 1925 of England "remains in force" in so far as the procedure and practice for the purpose of registering *lis pendens* is concerned.

The Act establishes a system of protecting by registration certain rights or claims affecting land but does not impose a statutory duty to effect registration. It is described as an effective means whereby persons entitled to the benefit of such burdens as are within the field of authorised registration may obtain protection by making their claims known to the world. (See *Halsbury's* Laws of England, 3rd Ed., Vol. 23, page 52, paragraph 97).

A further ground was raised by Mr. Mooney in support of his argument. He referred to the National Land Code and submitted that a similar remedy is provided therein in the form of caveats and because of this statutory provision the court has no power to entertain an action for *lis pendens*. He further stressed that in view of the indefeasibility of title of the registered proprietor of land, except in cases of fraud, misrepresentation or forgery as provided by section 340, any order for *lis pendens* will nullify the indefeasibility of title.

As regards the first point, it does not appear to me that the National Land Code either expressly or by implication forbids or limits the power of the High Court to make orders for the purpose of preservation of property by other means. Under the Code the Court has both power in certain matters, *e.g.* making an order for the extension of a private caveat (section 326) and jurisdiction under section 417 in giving effect to judgments or orders made in proceedings relating to land, apart from appellate power under section 418 thereof. On the other hand, as stated earlier, the powers and jurisdiction of the court on other matters not embodied in the Code, such as making an injunction order, are provided by the Courts of Judicature Act and the Rules of the Supreme Court. There is nothing repugnant for a plaintiff to apply *e.g.* for an injunction to preserve the *status quo* instead of a private caveat. Ong J. (as he then was) said in *K. I. Muhiudeen Rawther* v. *K. E. P. Abdul Kassim & Ors.*,[1] at page 258, which I accept with respect: —

"... Furthermore, upon a proper case being made out, the assistance of the court may always be invoked to preserve the *status quo* by injunction, though, of course, an injunction operating *in personam*, is not as effective as a caveat in giving notice to the whole world of the caveator's claim to or in the land, and may be completely ineffectual to prevent a disposal of the land so as to defeat the claimant."

A *lis pendens* may not be so effective as a caveat or an injunction to prevent a disposal of land, but its registration constitutes notice to the world and a subsequent purchaser may be affected thereby.

With regard to the second point, my attention is called to a passage by *Das* on The Torrens System in Malaya at page 251, and *Hogg* on Registration of Title to Land Throughout the Empire at page 183. The principle accepted therein as propounded in *Waimiha Saw Milling Co.* v. *Waione Timber Co.*,[2] which reports however was not available, is that registration of a *lis pendens* is excluded by the general terms of the Land Transfer Act, 1915, on the ground of the indefeasibility of the title of registered proprietors. Secondly, where statutes are silent, it has been held that registration is not permissible. I bear in mind that this is the most important point and have given careful thought on the matter. Relevant authorities

based on the provisions of the former Land Code have therefore to be considered in the light of the provisions in the present Code and the Courts of Judicature Act.

I am inclined to the view that the National Land Code of 1965 has certain provision which I believe was not present in the old Land Code. Similarly the Courts of Judicature Act, 1964, contains a provision which places it second only to the Federal Constitution. Section 447(1) of the Code provides that as follows: —

"Nothing in this Act shall affect the operation of any rules of court; and, if any provision of this Act is inconsistent with any provision of any rules of court, the latter provision shall prevail and the former provision shall, to the extent of the inconsistency, be void."

The effect of section 340 of the Code which renders the title of the registered proprietor of land to be indefeasible except in the case of fraud, misrepresentation, etc., clearly affects the operation of rule 2 of Order 72 of the Rules of the Supreme Court in that it excludes the application of the procedure and practice allowed by the rule. The section therefore by implication contravenes the provision of the rule and by virtue of section 447 of the Code is thereby rendered void to the extent of the inconsistency and the rule prevails. Further, the power of the High Court to order registration of a *lis pendens* as embodied in the First Schedule, paragraph 6 of the Courts of Judicature Act, appears also to be inconsistent with section 340 of the Code. Section 4 of the Act places its provisions to prevail against those of any statute (which includes the Code) other than the Federal Constitution, in case of inconsistency or conflict and the provisions of the Act, in this case the First Schedule to section 25, prevails.

Under these circumstances, I am of the considered judgment that the court has power to make an order for the registration of a *lis pendens*. I have no alternative but to dismiss the application to set aside the order with costs.

Application dismissed.

Solicitors: *Skrine & Co.; Allen & Gledhill.*

U.H.G. v. DIRECTOR GENERAL OF INLAND REVENUE

[F.C. (Azmi L.P., Suffian C.J. and Raja Azlan Shah F.J.) April 29, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 92 of 1973]

Income Tax — Appeal — Power of High Court to review conclusions of Special Commissioners — Findings of fact by Special Commissioners — Hirers of taxicabs not employees — Conclusions drawn on a view of facts not erroneous in law — Income Tax Act, 1967, ss. 91 and 140.

This was an appeal from the decision of the High Court ([1973] 2 M.L.J. 88) dismissing the appeal from the Special Commissioners on a case stated. The learned judge had held that there was sufficient evidence, on the facts found by the Special Commissioners, to support their decision that the drivers of taxi cabs were not employed by the taxpayer company and that the expenditure alleged to have been incurred by the taxpayer company in respect of wages and payments for diesel oil should be disallowed. The taxpayer company appealed to the Federal Court.

Held, dismissing the appeal: (1) the learned judge was correct in stating the law that the determination of the Special Commissioners could not be erroneous in point of law, unless it appeared that they acted without any evidence or on a view of facts which could not reasonably be entertained or that the primary facts did not justify the inferences drawn or conclusions arrived at;

(2) the conclusions drawn by the Special Commissioners were on the view of the facts not erroneous in law.

Cases referred to:-

(1) *Edwards (Inspector of Taxes)* v. *Bairstow and Harrison* [1956] A.C. 14.

(2) *Panama & South Pacific Telegraph Co.* v. *India Rubber & Telegraph Works Co.* (1875) L.R. 10 Ch. 526.

(3) *Taylor* v. *Oldham Corporation* 4 Ch. D. 395, 410.

(4) *Goodwin* v. *Phillips* (1909) 7 C.L.R. 1, 14.

(5) *Mandavia* v. *Income Tax Commissioners* [1959] A.C. 114, 123.

(6) *Meenakshi Mills Ltd.* v. *Viswanatha Sastri* A.I.R. 1955 S.C. 13.

(7) *Rosette Franks* v. *Dick* 36 T.C. 100, 108.

(8) *Cooper* v. *Stubbs* 10 T.C. 29.

(9) *Bean* v. *Doncaster Amalgamated Collieries Ltd.* 27 T.C. 296, 307.

(10) *Ramkinkar Banerji* v. *Commissioner of Income Tax* A.I.R. 1939 Patua 267, 268.

(11) *Great Western Railway Co.* v. *Bater* (1928) 8 T.C. 231, 244.

FEDERAL COURT.

V. K. Palasuntharam for the appellant.

Zulkifli bin Mahmood (Senior Federal Counsel) for the respondent.

Raja Azlan Shah F.J.: This is an appeal from the decision of Gill F.J., [1973] 2 M.L.J. 88, dismissing the appeal against the Special Commissioners on a Case Stated. The question of law for the opinion of the High Court is whether, on the facts found by the Special Commissioners, there is evidence to support their decision in disallowing the expenditure alleged to have been incurred by the taxpayer company in respect of wages and payments for diesel fuel. The learned judge held that there was sufficient evidence to support their finding.

The relevant facts which the Special Commissioners have had to consider are voluminous. They have been comprehensively assembled and analysed in the Case Stated and again in the judgment of Gill F.J. Having the benefit of this analysis and the findings which were made, I can state with comparative brevity those matters which appear to be of significance in the appeal on the basis that if amplification is desired on any point, reference may be made to the Case Stated and the judgment of Gill F.J.

It is well established that where the appeal is by way of a Case Stated a statutory duty is laid upon the Special Commissioners to set forth the facts as found by them and the deciding order but not the evidence on which the findings are based. The court of appeal is not concerned with the evidence given in the Case Stated but with the facts therein stated and it is points of law upon those facts the court has to decide. The question for the court of appeal therefore is whether, given the facts as stated, the Special Commissioners were justified in law in reaching the conclusions they did reach.